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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 410.

LUCILE P. DICKIE,
Executrix of the Estate of James S. Dickie, Deceased,
Petitioner,

vs.

GENE C. HUTCHINSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NATURE AND ORIGIN OF CASE.

The single issue involved in this litigation is whether or not the drowning of Petitioner's decedent was proximately caused by Respondent's negligence. After "minutely" examining the record, three Judges of the Circuit Court found no evidence to support the findings or the decree of the District Court and "found no actionable negligence on the part of appellant (Respondent)" (R. 167, 168).

On September 20, 1943, Petitioner's husband, James S. Dickie, decedent, while a social guest on Respondent's yacht Cappy, during a cruise on Lake Erie, fell overboard and drowned. Petitioner, as Executrix, made claim upon Respondent for wrongful death damages. Thereupon, Respondent filed his petition in the District Court for limitation of liability in accordance with the provisions of the Act of March 3, 1851, as amended, 46 U. S. C. A., §§ 183-185, sometimes referred to herein as Shipowners' Limited Liability Act. In that proceeding, Petitioner filed claim for damages and answer challenging Respondent's

right to limit. In due course, Respondent's petition and Petitioner's claim were heard on the merits by the District Court and that Court entered a final decree awarding Petitioner damages in the sum of $30,000. Respondent appealed to the Circuit Court where the decree was reversed.

COUNTER-STATEMENT OF FACTS.

Petitioner's statement being inaccurate in many particulars, and having omitted several material facts, Respondent deems it necessary to make a brief statement of the facts.

Petitioner's decedent, a resident of Cleveland, was Vice President of the American Ship Building Company, whose business is the construction and repair of vessels (R. 39, 40). Educated at Glasgow University, from which he received the degree of naval architect, decedent spent his entire adult life in the shipbuilding industry (R. 71, 82). Respondent, likewise a resident of Cleveland, is a partner of Hutchinson & Company, whose business is the management of Great Lakes vessels (R. 35). Decedent and Respondent had known each other for about ten years (R. 39).

Respondent's yacht Cappy was a standard 38′ Matthews cruiser equipped with two engines and having twin screws. The cabin, which was located amidships, and in which the engine controls and steering wheel were situated, seated about eight people. Aft of the cabin was the cockpit, having guard rails and stanchions on each side and a minimum depth of 2′ 6″ at the stern. Chairs were placed in the cockpit for the convenience and pleasure of Respondent's family and guests (R. 36, 37, 38, 42).

At noon, September 20, 1943, decedent and Respondent met at Allendorf's restaurant in downtown Cleveland and, with two other friends, had lunch (R. 40, 52). During lunch Respondent invited decedent and the other men for a cruise that afternoon in the Cappy (R. 40).

Respondent kept the Cappy at the Clifton Lagoon in Rocky River, some ten miles to the westward of downtown Cleveland (R. 52, 54). From Allendorf's Respondent and his guests proceeded to Clifton Lagoon by automobile (R. 40).

Because the channel at Clifton Lagoon was temporarily obstructed by a derrick scow, there was some delay in the commencement of the cruise (R. 41). However, about 4:30 P. M. the cruise was begun (R. 42). Respondent operated the controls and handled the Cappy from her mooring berth into Lake Erie (R. 42). It was his practice to handle his own boat (R. 36) and he was considered a good yachtsman (R. 89). Out in the lake, Respondent turned the steering wheel over to Rhoda (R. 42). Rhoda was not the captain of the Cappy as claimed by Petitioner, but was employed on occasion to assist Respondent in the upkeep and handling of the Cappy (R. 40).

On Lake Erie the wind was light northerly with some sea running, the maximum wind velocity for the day being about 14 miles per hour (R. 43, 68). As the Cappy entered Cleveland Harbor, Respondent again took the wheel and navigated the Cappy through the harbor to Lakeside Yacht Club which is located near East 49th Street (R. 42).

There was occasional drinking by the party. Both the District Court and the Circuit Court found that 5 to 6 drinks had been served within a period of four to five hours (R. 143, 166).

After spending about 45 minutes at Lakeside Yacht Club, the Cappy commenced the return run to Rocky River (R. 43, 101). Respondent handled the Cappy (R. 105). Leaving Cleveland Harbor all members of the party were in the cabin except decedent who sat in a chair on the port side of the forward end of the cockpit, where, through the open cabin door, he conversed with one of the other guests (R. 45, 46). Reaching the lake, the Cappy headed into the sea and wind and her speed was reduced from about 12

miles per hour to about 7 or 8 miles per hour (R. 62). After running into the wind and sea in a northerly direction for a distance of about one-half mile, the Cappy squared away to westward for the Rocky River Harbor Entrance (R. 44). At that time, Respondent observed that decedent was still seated in the chair in the cockpit (R. 45).

Some few minutes after the Cappy was squared away for Rocky River, someone called "man overboard" (R. 46). Immediately looking aft, Respondent saw decedent in the water over the port quarter at a distance of about 75′ to 100′ (R. 46). Simultaneously, Respondent reversed the motors of the Cappy to full speed astern, stopped the Cappy's headway, brought the Cappy astern and kept a close lookout for decedent (R. 46, 47).

Two life rings aft, held in racks, one on each side of the cabin, were thrown in rapid succession by Rhoda to decedent. The first landed within 20′ of him and the other within 6′ (R. 46, 47). Although decedent was afloat, he made no apparent effort to reach either life ring (R. 47). After throwing the two life rings to decedent, Rhoda went forward around the outside of the cabin to get a boat hook (R. 47, 48). Meantime, respondent remained at the controls and continued to bring the Cappy astern so that decedent would be kept in sight and would first be reached from the cockpit, the only place from which he could be rescued (R. 47, 61). However, when the Cappy was within about 20′ of decedent, and before Rhoda was able to return with the boat hook, decedent sank and disappeared from view (R. 48).

Not more than three or four minutes elapsed between decedent's fall overboard and his sinking (R. 133). Within a few minutes a Coast Guard picket boat joined the Cappy in the search for decedent which continued until about dusk (R. 49). Respondent then went to the Coast Guard Station in Cleveland outer harbor and made report of decedent's drowning (R. 49). After making the report, Re-

spondent returned to Clifton Lagoon and immediately went to Petitioner's house, where he informed her of decedent's drowning (R. 49).

REASONS FOR DENYING THE PETITION.

(1) No federal statute was erroneously construed.

(2) No question of law is presented for consideration by this Court.

(3) Petitioner has set forth no sound reason for the allowance of the writ.

ARGUMENT.

(1) No Federal Statute Was Erroneously Construed.

The issue as to Petitioner's right to recover damages in the lower courts involved no statutory fault on Respondent's part. Petitioner pleaded no statute in her claim or answer filed in the District Court. Nor did she claim that any statute was violated. It was uncontradicated that neither by Act of Congress nor by regulation was there any requirement for the crewing of a pleasure yacht such as the Cappy.

There was no occasion for a construction by the courts below of the Motor Boat Act of 1940; 46 U. S. C. A. §§ 526-526t. That act (1) classifies motor boats up to 65′ in length (2) prescribes for them lights, life preservers and other safety appliances and (3) establishes penalties for violation of the requirements of the Act. No evidence was offered to show any violation of that Act for the reason that there was no such violation. Petitioner refers to paragraph 526*l* which reads:

> "526*l*. Reckless or negligent operation of vessels; prohibition.
>
> No person shall operate any motorboat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person. Apr. 25, 1940, c. 155, § 13, 54 Stat. 166."

The Circuit Court found that there was no negligence on Respondent's part. The first attempt to inject the Motor Boat Act occurred in the brief supporting the petition for rehearing in the Circuit Court.

(2) No Question of Law is Presented for Consideration By This Court.

The proceedings in the District Court presented two issues for determination, i.e., the right of Respondent to limit his liability and the right of Petitioner to wrongful death damages. In the courts below Petitioner challenged Respondent's right to limit liability and was sustained by both courts. Clearly there is no necessity for this Court to review the decisions on this issue.

With respect to Petitioner's right to recover damages, the Circuit Court, purely on a factual consideration, reversed the District Court on the ground that it found "no actionable negligence on the part of appellant (Respondent)" (R. 168). The Circuit Court's decision involved no contested questions of law and presents no question of law for consideration by this Court.

(3) Petitioner Has Set Forth No Sound Reason For the Allowance of the Writ.

Petitioner's First Reason: In reviewing the record in this case the Circuit Court said (R. 167):

> "• • • We recognize the correctness of the rule that we should accord due weight to the findings and judgment of the Court, but we are not bound to accept them."

Petitioner urges that this statement of the rule is erroneous and is in conflict with the law applied in the Second, Third, Fourth, Seventh and Ninth Circuits. Petitioner argues that the holdings in those circuits is that the findings of a District Court in Admiralty cases rendered after a trial, in which the Court saw the witnesses and heard their

testimonies, are binding upon a Circuit Court and should not be set aside unless clearly erroneous.

In the concluding paragraph of the opinion in this case the Circuit Court stated (R. 167-168):

> "We are required to examine the record and determine for ourselves whether it fairly supports the findings. This we have done, minutely; and our conclusion is that there is no evidence to support either the findings in the matter above indicated or the decree. * * * as stated we have found no actionable negligence on the part of appellant (Respondent)."

It is submitted that, where there is no evidence to support findings, then those findings are "clearly erroneous."

Disregarding findings of the District Court not supported by the evidence and, therefore, clearly erroneous, the Circuit Court followed a rule well settled in the Sixth Circuit: *City of Cleveland vs. McIver* (C. C. A. 6) 109 F. 2d 69; *The Seeandbee* (C. C. A. 6) 102 F. 2d 577; *The Cleveco* (C. C. A. 6) 154 F. 2d 605; *Lamb vs. Interstate SS Co.* (C. C. A. 6) 149 F. 2d 914. Not only is the Sixth Circuit in accord with other circuits, but the Circuit Court applied the law as claimed by Petitioner.

Petitioner's Second Reason: It is urged that the Circuit Court could not deny Respondent's petition to limit liability and at the same time dismiss Petitioner's claim for damages. In reviewing the case the Circuit Court followed the order adopted in the District Court by first considering the petition and then the claim for damages. Treated in that order there was no relationship between the two proceedings. Obviously because Respondent's proof on his own petition showed that he was in charge of his own yacht at the time the decedent fell overboard, both courts concluded that the loss could not have occurred without his "privity or knowledge." 46 U. S. C. A. § 183(a).

No rule of substantive law prescribed by statute or recognized by the general maritime law is involved. The

question simply relates to the order in which issues are considered.

The decision of the Circuit Court leaves no uncertainty as to the disposition of Petitioner's claim. Petitioner requested the District Court to take jurisdiction of the claim for damages (R. 131). Having taken jurisdiction the Court was not only competent, but required, to dispose of the claim on the merits. *Providence & New York Steamship Company vs. Hill Manufacturing Co.*, 109 U. S. 578.

Petitioner's Third Reason: The Circuit Court said nothing which would indicate that the findings of the District Court should have been evidentiary in nature. The Circuit Court, after "minutely" examining the record, found relevant and undisputed facts for which there were no findings, either evidentiary or ultimate, and to which no reference was made in the District Court's opinion. If the language in the opinion of the Circuit Court is to be construed as criticism, then we submit that it was criticism only of the omissions of the District Court. The reversal of the District Court was not based on the form of the findings of fact and conclusions of law or the omissions in connection therewith but on more substantial grounds. The Circuit Court in its opinion stated (R. 167):

> "We are required to examine the record and determine for ourselves whether it fairly supports the findings. This we have done, minutely; and our conclusion is that there is no evidence to support either the findings in the matter above indicated or the decree."

Petitioner's Fourth Reason: By urging that the Circuit Court should have sent the case back to the District Court for further findings, Petitioner argues in effect that the Circuit Court was incompetent to review the record and make its own findings. An appeal in admiralty is a trial *de novo*. *Irvine vs. The Hesper*, 122 U. S. 256. The entire record is open to review and the Appellate Court may affirm, modify or reverse the decree as the interests of justice require. *Brown Paper Mills Co. vs. Irvine,*

(C. C. A. 8) 134 F. 2d 337, which is cited in the petition was an action at law and has no application in admiralty.

Petitioner's Fifth Reason: Petitioner misinterprets the holding of the Circuit Court that Respondent had the right to assume that decedent would use ordinary care for his own protection, and, as misinterpreted, attacks it. On this point the Circuit Court said (R. 165):

> "It was also shown that Dickie, 63 years of age and the Vice President of a shipbuilding concern, was an experienced seaman and a good swimmer, although he had defective vision in one eye and wore heavy glasses. Under these circumstances we think that appellant (Respondent) had a right to assume that Dickie would use ordinary care to protect himself and that it was not required of appellant (Respondent) to anticipate the necessity of having a life guard as a member of the crew. As a matter of law, appellant (Respondent) was not required to have a crew at all. He was not even required to have a license."

In further aid of her argument Petitioner, without any support in the record supplies the fact that decedent was in a position of danger while sitting in the chair in the cockpit. Neither the District Court nor the Circuit Court found that decedent was in any danger as he sat in the cockpit.

We do not deem it proper to argue the factual matters set forth in Petitioner's Brief on this point. It seems sufficient to say that the Circuit Court was on sound ground in holding that Respondent had a right to assume that decedent would use ordinary care to protect himself.

Petitioner's Sixth Reason: The inapplicability of the Motor Boat Act of 1940 has been discussed previously herein, page 5. Petitioner's argument under this point mentions the "common law of the sea" with a reference to 33 U. S. C. A. § 351. It would seem that Petitioner has gone far afield for authority as that section forms part of the "Navigation Rules for Red River of The North and Rivers Emptying into Gulf of Mexico and Tributaries."

Equally strained is Petitioner's attempt to give the impression that under authority of *The Linseed King*, 285 U. S. 502, Respondent was required to carry on the Cappy, a pleasure yacht, a life guard and crew. In that case an employer was using his own boat to transport his employes to their place of work. It is not true, as argued by Petitioner, that the Motor Boat Act of 1910 influenced the result in *The Linseed King*. There was no claim in that case that the Motor Boat Act of 1910 was violated. The District Court in that case stated that this latter Act merely prescribed life preservers for motor boats, 24 F. 2d 967, 970. The remaining cases cited in the petition on this point relate to commercial ships transporting cargo.

Petitioner's Seventh Reason: Because Petitioner obviously distorts the opinion of the Circuit Court with respect to the use of intoxicants, this reason is meaningless. What the Circuit Court said with reference to drinking was clear and concise and subject to no misinterpretation (R. 166):

> "We are bound by finding 3 that appellant (Respondent) and his guests had five or six drinks of liquor within a period of four or five hours before the accident, but we are not bound by finding 7 that appellant (Respondent) was incapable of coordination due to the use of liquor, coupled with his physical impairment, at the time of the accident. There is of course a presumption that intoxicating liquor if used to excess, will affect a person both mentally and physically, but there is no evidence that appellant's (Respondent's) judgment was so affected at the time Dickie went overboard. The undisputed evidence is that at that time appellant (Respondent) was steering the cruiser at about seven or eight miles an hour because of the roll of the lake. Moreover, there is no finding that appellant's (Respondent's) drinking, or physical condition, contributed in the least to the unsuccessful effort to rescue Dickie."

The cases cited by Petitioner on this point hold that, where a ship at the time of collision is in statutory fault, there is a presumption that the fault was a contributory

cause and the burden is on the ship to prove to the contrary. The principle considered and followed by the Circuit Court in this case is the law stated by this Court in *Union Pac. R. Co. vs. McDonald*, 152 U. S. 262, where p. 282, it was said:

> "Where human life or personal safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or to secure the other, unless the circumstances, under which that effort was made, show recklessness, or rashness."

Petitioner's Eighth Reason: There is no question respecting the Ohio Wrongful Death Statute. O. G. C. § 10509-166. It is wholly incorrect, as claimed by Petitioner, that the Circuit Court construed the Ohio statute contrary to the applicable decisions of this Court. The Circuit Court did not construe that statute at all. The Court merely commented that the defense of contributory negligence was available under the statute, but stated in the concluding paragraph of the opinion that consideration of this defense was not necessary because "we have found no actionable negligence on the part of appellant (Respondent)" (R. 168).

CONCLUSION.

It is submitted that this case is not a proper one for review by certiorari in this Court. No question of law is presented. The issue is purely factual without any element of national importance or public interest.

Respectfully submitted,

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